

FEDERAL CIRCUIT COURT OF AUSTRALIA

*HAYWARD v MINISTER FOR IMMIGRATION &
ANOR*

[2020] FCCA 1009

Catchwords:

MIGRATION – Application for Partner Visa – adverse credibility finding – non-satisfaction of qualifying criteria for determination of genuine spousal relationship – no evidence that Tribunal was affected by apprehended bias – no jurisdictional error established – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 116(1)(aa).

Migration Regulations 1994 (Cth.), r.1.15A, Sch.2, cl.309.

Cases cited:

Lo v Chief Commissioner of State Revenue (2013) 85 NSWLR 86.

YYY17 v Minister for Immigration and Border Protection & Anor (2018) 261 FCR 503.

CNY17 v Minister for Immigration and Border Protection (2019) 94 ALJR 140.

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611.

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.

Applicant:	ALLAN DOUGLAS HAYWARD
First Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 946 of 2019
Judgment of:	Judge Egan
Hearing date:	16 April 2020
Date of Last Submission:	16 April 2020
Delivered at:	Brisbane

Delivered on:

6 May 2020

REPRESENTATION

Counsel for the Applicant: Mr Jones

Solicitors for the Applicant: Stolar Law

Counsel for the First Respondent: Mr Nolan

Solicitors for the First
Respondent: Clayton Utz

Second Respondent Submitting appearance save as to costs

ORDERS

- (1) The application for review filed on 4 October 2019 be dismissed.
- (2) The applicant pay the First Respondent's costs of and incidental to the application for review fixed in the amount of \$7,467.00.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 946 of 2019

ALLAN DOUGLAS HAYWARD

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The visa applicant is a female citizen of China born in 1968. The male review applicant is a citizen of Australia, who was born in Australia, in 1942.
2. On 29 May 2017, the visa applicant applied for a Partner (Provisional) (Class UF) Visa on the basis of her relationship with the review applicant. The relevant criteria for the grant of that visa are as contained in cl. 309 of Schedule 2 to the *Migration Regulations 1994* (Cth.) ('the Regulations') which provided as follows:

"309.1—Interpretation

309.111

In this Part:

intended spouse means the person referred to in subparagraph 309.211(3)(a)(i), (ii) or (iii).

Note: **eligible New Zealand citizen** and **guardian** are defined in regulation 1.03, **parent** is defined in subsection 5(1) of the Act (also see regulation 1.14A), **de facto partner** is defined in section 5CB of the Act (also see regulation 1.09A), and **spouse** is defined in section 5F of the Act (also see regulation 1.15A).

309.2—Primary criteria

Note: The primary criteria must be satisfied by at least 1 member of a family unit. The other members of the family unit who are applicants for a visa of this subclass need satisfy only the secondary criteria.

309.21—Criteria to be satisfied at time of application

309.211

- (1) *The applicant meets the requirements of subclause (2) or (3).*
- (2) *The applicant meets the requirements of this subclause if the applicant is the spouse or de facto partner of:*
 - (a) *an Australian citizen; or*
 - (b) *an Australian permanent resident; or*
 - (c) *an eligible New Zealand citizen.*
- (3) *The applicant meets the requirements of this subclause if:*
 - (a) *the applicant intends to marry:*
 - (i) *an Australian citizen; or*
 - (ii) *an Australian permanent resident; or*
 - (iii) *an eligible New Zealand citizen; and*
 - (b) *the intended marriage will, if it takes place, be a valid marriage for the purposes of section 12 of the Act.*

Note: If the applicant is an applicant referred to in subclause 309.211(3), the marriage must have taken place before the applicant can be granted a visa of this subclass: see clause 309.224.

309.212

(1) The spouse, de facto partner or intended spouse of the applicant is not prohibited by subclause (2) from being a sponsor.

(2) The spouse, de facto partner or intended spouse is prohibited from being a sponsor if:

(a) the applicant is a male person; and

(b) the spouse, de facto partner or intended spouse is a woman who was granted a Subclass 204 (Woman at Risk) visa within the 5 years immediately preceding the application; and

(c) on the date of grant of that visa:

(i) the applicant was a former spouse or former de facto partner of that woman, having been divorced or permanently separated from that woman; or

(ii) the applicant was the spouse or de facto partner of that woman and that relationship had not been declared to Immigration.

309.213

(1) If the applicant is an applicant referred to in subclause 309.211(2), the applicant is sponsored:

(a) if the applicant's spouse or de facto partner has turned 18—by that spouse or de facto partner; or

(b) if the applicant's spouse has not turned 18—by a parent or guardian of that spouse who:

(i) has turned 18; and

(ii) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

(2) If the applicant is an applicant referred to in subclause 309.211(3), the applicant is sponsored:

(a) if the applicant's intended spouse has turned 18—by that intended spouse; or

(b) if the applicant's intended spouse has not turned 18—by a parent or guardian of that intended spouse who:

(i) has turned 18; and

(ii) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

309.22—Criteria to be satisfied at time of decision

309.221

The applicant continues to satisfy the criterion in clause 309.211.

309.222

(1) The sponsorship referred to in clause 309.213 has been approved by the Minister and is still in force.

Note: Regulations 1.20J, 1.20KA, 1.20KB and 1.20KC limit the Minister's discretion to approve sponsorships.

(2) The sponsor has consented to the disclosure by the Department, to each applicant included in the sponsorship, of any conviction of the sponsor for a relevant offence (within the meaning of subregulation 1.20KC(2)).

Note: The sponsor may be asked to consent to such disclosure on the approved form required to be completed by the sponsor in relation to the visa application.

(3) For the purposes of subclause (2), the conviction of the sponsor for a relevant offence is to be disregarded if:

(a) the conviction has been quashed or otherwise nullified; or

(b) both:

(i) the sponsor has been pardoned in relation to the conviction; and

(ii) the effect of that pardon is that the sponsor is taken never to have been convicted of the offence.

309.223

In the case of an applicant who meets the requirements of subclause 309.211(2), the applicant continues to be the spouse or de facto partner of the person referred to in paragraph 309.211(2)(a), (b) or (c) who was the applicant's spouse or de facto partner at the time of the application.

309.224

If the applicant is an applicant referred to in subclause 309.211(3), the marriage referred to in that subclause has taken place and the applicant continues to be the spouse of the intended spouse.

309.225

The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009, 4020 and 4021; and

(b) if the applicant had turned 18 at the time of application —satisfies public interest criterion 4019.

309.226

If the applicant has previously been in Australia, the applicant satisfies special return criteria 5001 and 5002.

309.228

(1) Each member of the family unit of the applicant who is an applicant for a Subclass 309 visa is a person who:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009 and 4020; and

(aa) if the person had turned 18 at the time of application, satisfies public interest criterion 4019; and

(b) if the person has previously been in Australia, satisfies special return criteria 5001 and 5002.

(2) Each member of the family unit of the applicant who is not an applicant for a Subclass 309 visa is a person who:

(a) satisfies public interest criteria 4001, 4002, 4003 and 4004; and

(b) satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

309.229

If a person (in this clause called the additional applicant):

(a) is a member of the family unit of the applicant; and

(b) has not turned 18; and

(c) made a combined application with the applicant—

public interest criteria 4015 and 4016 are satisfied in relation to the additional applicant.

309.3—Secondary criteria

Note: These criteria must be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.

309.31—Criteria to be satisfied at time of application

309.311

The applicant is a member of the family unit of, and made a combined application with, a person who satisfies the primary criteria in Subdivision 309.21.

309.312

The sponsorship referred to in clause 309.213 of the person who satisfies the primary criteria includes sponsorship of the applicant.

309.32—Criteria to be satisfied at time of decision

309.321

The applicant:

(a) continues to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a

*Subclass 309 (Partner (Provisional)) visa (the **person who satisfies the primary criteria**); or*

(b) is a person to whom each of the following applies:

(i) the person made a combined application with the person who satisfies the primary criteria;

(ii) subsequent to the combined application being made, the person was found by the Minister not to be a member of the family unit of the person who satisfies the primary criteria;

(iii) subsequent to the person who satisfies the primary criteria being granted a Subclass 309 (Partner (Provisional)) visa and Subclass 100 (Partner) visa—the Tribunal found the person to be a member of the family unit of the person who satisfies the primary criteria.

309.322

The sponsorship referred to in clause 309.312 has been approved by the Minister and is still in force.

Note: For limitations on the Minister's discretion to approve sponsorships see regulation 1.20J.

309.323

The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4007, 4009, 4020 and 4021; and

(b) if the applicant had turned 18 at the time of application—satisfies public interest criterion 4019.

309.324

If the applicant has previously been in Australia, the applicant satisfies special return criteria 5001 and 5002.

309.326

If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

309.4—Circumstances applicable to grant

309.412

The applicant must be outside Australia at the time of grant.

309.5—When visa is in effect

309.511

Temporary visa permitting the holder to travel to, enter and remain in Australia until the end of the day on which:

- (a) the holder is notified that the holder's application for a Partner (Migrant) (Class BC) visa has been decided; or*
- (b) that application is withdrawn.*

309.6—Conditions

309.611

First entry must be made before a date specified by the Minister for the purpose.

309.612

If the applicant meets the primary criteria, condition 8502 may be imposed.

309.613

If the applicant meets the secondary criteria, either or both of conditions 8502 and 8515 may be imposed."

3. On 19 December 2018, a delegate of the Minister refused to grant the visa because the delegate was not satisfied that the visa applicant was the spouse of the review applicant within the meaning of the *Migration Act 1958* (Cth.) ('the Act'). Section 5F of the Act provided as follows:

"(1) For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

- (a) they are married to each other under a marriage that is valid for the purposes of this Act; and*

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.”

4. On 30 September 2019, the Administrative Appeals Tribunal (‘the Tribunal’) affirmed the decision of the delegate.
5. On 4 November 2019, the review applicant filed an originating application for review of the decision of the Tribunal. The grounds for review relied upon at the hearing before the Court were as follows:

“Grounds of Application

1. The Tribunal, in reaching its decision relied upon irrelevant considerations and the outcome was adversely affected.

Particulars:

a) The Visa Applicant married her visa sponsor, an Australian citizen, on 16 December 2016, in Hong Kong.

b) The marriage of the parties is valid for the purposes of the Migration Act 1958 (‘the Act’)

c) The Visa Applicant is a citizen of the People’s Republic of China

d) The Visa Applicant and the Sponsor travelled together to Australia o 7 January 2017.

e) Upon arrival in Australia, the Visa Applicant was questioned by Australia Border Force and her visa was cancelled under section 116(1)(aa) of the Act. She had previously overstayed a Visitor's visa and was subject of a three year exclusion period (excluded until 25 September 2019);

f) The Visa Applicant applied for a Partner visa on 29 May 2017;

g) The Application was refused on the basis, the Visa Applicant did not satisfy clause 309.211 of Schedule 2 of the Migration Regulations, 1994, in that the decision maker was not satisfied there was a sufficient evidence to support a finding the visa applicant was the spouse of the sponsor;

h) The Visa Applicant and the Sponsor appeared before the Tribunal on 12 September 2019;

i) The Tribunal made its decision on 30 September 2019 to affirm the decision not to grant the Visa Applicant with a Partner visa;

j) In the Tribunal's reasons for its decision, the Tribunal relied upon a number of assumptions, which are wrong at law and/or are not supported by the evidence before the Tribunal, and

k) In relying upon this material, referred to in point (j), to form its reasons for the decision, the Tribunal fell into jurisdictional error.

And/or

2. The Tribunal's decision is adversely affected by apprehended bias. The Tribunal was not impartial in making its decision and fell into jurisdictional error.

Particulars:

a) The Visa Applicant married her visa sponsor, an Australian citizen, on 16 December 2016, in Hong Kong;

b) The marriage of the parties is valid for the purposes of the Migration Act, 1958 ('the Act');

c) The Visa Applicant is a citizen of the People's Republic of China;

d) The Visa Applicant and the Sponsor travelled together to Australia on 7 January 2017;

e) Upon arrival in Australia, the Visa Applicant was questioned by Australia Border Force and her visa was cancelled under section 116(1)(aa) of the Act. She had previously overstayed a Visitor's visa and was subject of a three year exclusion period (excluded until 25 September 2019);

f) The Visa Applicant applied for a Partner visa on 29 May 2017;

g) The Application was refused on the basis, the Visa Applicant did not satisfy clause 309.211 of Schedule 2 of the Migration Regulations, 1994, in that the decision maker was not satisfied there was a sufficient evidence to support a finding the visa applicant was the spouse of the sponsor;

h) The Visa Applicant and the Sponsor appeared before the Tribunal on 12 September 2019;

i) The Tribunal made its decision on 30 September 2019 to affirm the decision not to grant the Visa Applicant with a Partner visa;

j) In the Tribunal's reasons for its decision, the Tribunal relied upon a number of assumptions, which are wrong at law and/or are not supported by the evidence before the Tribunal, and

k) In relying upon this material, the Tribunal appeared not to act impartial in making its decision."

6. At [12] of its reasons, the Tribunal noted that the issue before it was whether the visa applicant was the spouse of the review applicant. At [13] – [15] of its reasons, the Tribunal relevantly set out the matters which had to be considered when assessing claims that a spousal relationship existed. Matters which were required to be taken into account were as set out in Regulation 1.15A(3) of the Regulations as follows:

“1.15A Spouse

...

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses; and*
- (b) the nature of the household, including:*
 - (i) any joint responsibility for the care and support of children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework; and*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities; and*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*

(iv) whether the persons see the relationship as a long-term one.”

7. Ground 1

8. Ground 1 of the application for review is an assertion that the Tribunal fell into error by having regard to irrelevant considerations such that the outcome of the visa application had been effected. The submissions filed on behalf of the applicant claimed that the Tribunal improperly considered irrelevant material which had been provided to it by the Department of Immigration and Border Protection relating to:

- a) Evidence that when departing Australia for Hong Kong on 25 September 2016, after having spent fourteen (14) months in Australia unlawfully, the visa applicant was in the company of a male Australia citizen, other than the review applicant, who confirmed that he had been in a relationship with the visa applicant for a period of eight (8) months prior to departure.
- b) Further evidence that the visa applicant had worked in the massage industry during her stay in Australia though she had been excluded from re-entering Australia for a three (3) year period until 25 September 2019 because of prior visa breaches.¹
- c) Evidence that bank cash deposit slips found in the visa applicant's possession at the time she was departing Australia in September 2016 showed that the sum of \$70,000 dollars had been deposited into a number of bank accounts.
- d) Further evidence that, when it was put to her by border force officers that she had been working in the sex industry, she claimed that she had received the money from one of her cousins who lived in Sydney following the sale of a property there.² That assertion was made in circumstances where the male then travelling with her had said that the visa applicant had been working in the massage industry.

¹ [6] of reasons of Tribunal at Court Book (CB) p. 310.

² [17] of reasons of Tribunal at CB p. 311.

9. The making of a claim that the Tribunal had had regard to irrelevant considerations is not easily made out. As was said by Basten J in *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 at [9]:

“[9] The “something more” requires reference to the dual concepts of “relevant considerations” and “taking into account”. The term “relevant considerations” is widely misunderstood: as used in leading authorities, such as Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39 per Mason J, it refers to a matter which the decision-maker is bound to take into account. The obligation may derive from the express terms of the power-conferring statute or may be implied from its subject matter, scope and purpose. A preferable term would be “mandatory consideration”. Further, a matter traditionally described as an “irrelevant consideration” is one which is prohibited because, having regard to the subject matter, scope and purpose of the power being exercised, it can be seen to reflect an extraneous or improper purpose or to render the decision arbitrary or capricious. Between these two categories is usually a wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law.”

10. The visa applicant and the review applicant met in 2015 and arranged to marry in March 2016. After a disagreement before the proposed marriage, the review applicant said that he had no contact with the visa applicant until November 2016 when she began ringing him and asking him to visit her. The review applicant claimed that he was aware that the visa applicant was in another relationship as at November 2016. The visa applicant and the review applicant were married in Hong Kong on 16 December 2016.³
11. At [7] of its reasons, the Tribunal noted that after the visa applicant had been excluded from travel to Australia for three (3) years subsequent to 25 September 2017, the visa applicant had changed her name by Deed Poll and had obtained another passport, in a new name, which had enabled her to travel to Australia with the review applicant on or about 7 January 2017. It was further noted that because of her unlawful re-entry into Australia, her visa had been cancelled on the spot pursuant to s. 116(1)(aa) of the Act.

³ [8] – [10] of reasons of Tribunal at CB p. 310 – 311.

12. The Tribunal's consideration of those matters referred to in [7] – [10] hereof inclusive went to issues of the visa applicant's credibility. When assessing the relevant r. 1.15A(3) and s. 5F criteria, the Tribunal was required to weigh up all of the evidence before it so as to arrive at a decision as to whether a genuine spousal relationship existed between the parties or not. Credibility issues necessarily were relevant to the Tribunal's overall decision-making exercise. The Court does not accept the review applicant's submissions that the matters identified by the review applicant were irrelevant. The Tribunal was entitled to find, as it did at [32] of its reasons, as follows:

“[32] The sponsor was ignorant of the applicant's unlawful status in Australia; the fact that she had been banned from re-entering Australia; because she had been unlawful and has accepted the applicant's story that he did not know that the applicant's name change was not done specifically with the intent of being able to re-enter Australia despite the ban. The Tribunal does not accept the applicant's account that she changed her name on the advice of a fortune teller who told her it would be good luck to do so. In the context of all the other evidence and the applicant's general lack of credibility, this account seems too convenient and the letter from the alleged fortune teller, attesting to the fact that the decision had been made to change her name prior to the cancellation of her visa, is not accepted by the Tribunal as a genuine account.”

13. Further, as to the criteria to be considered in the assessment of whether a genuine spousal relationship existed or not, the Tribunal:
- a) At [20] of its reasons, found the visa applicant's evidence to be unreliable and frequently implausible. It also found that the review applicant's awareness of the visa applicant's activities, the source of her funds, and nature of her work were either complete or unknown.
 - b) At [22], noted that the sponsor was not aware at the time of the hearing that the visa applicant had \$70,000 in her bank account, the Tribunal noting that the review applicant had told the Tribunal that he thought that she had around \$10,000, saying further that he really didn't consider that to be any of his business. The Tribunal noted that the fact that the review applicant neither knew nor cared about the visa applicant's financial position did not

support a finding that the parties had a long-term commitment to a shared life together as husband and wife.

- c) At [24], noted that the parties had lived together in the same household for approximately eleven (11) months from around April 2015 to March 2016 when they broke up as a result of the visa applicant having had an affair. During that time the review applicant did not know that the visa applicant had overstayed her visa and was unlawfully in Australia.
 - d) At [25], noted that each of the visa applicant and the review applicant maintained their own financial resources.
 - e) At [27], recorded that there was little evidence as to the nature of their household and how it functioned during the period of time when they had allegedly lived together. The Tribunal was not satisfied that there was sufficient evidence of the nature of the household to support a finding that the parties were in a genuine and continuing relationship to the exclusion of all others. There were no children born of the relationship between the two of them.
 - f) At [29], recorded that though one of the visa applicant's friends had given evidence at the hearing that she didn't know that the visa applicant had overstayed her visa, the applicant had said to the Tribunal that she had told that friend that she had remained in Australia unlawfully. The Tribunal was entitled to give little weight to the friend's evidence in circumstances where the visa applicant had been invited to provide further evidence from that friend by way of a written submission, and where it had turned out to be contradictory to her evidence.
 - g) At [30], was not persuaded to find that the sponsor and visa applicant were in a genuine spousal relationship notwithstanding that there were some family and friends who accepted the statements of the parties that their relationship was genuine.
14. The evidence advanced by the parties as to daily routines and other personal aspects of the relationship was either absent or vague. A Tribunal is only required to consider clearly articulated argument and

claims which clearly emerged from the evidence. As was said by Collier, McKerracher and Banks-Smith JJ in *AYY17 v Minister for Immigration and Border Protection & Anor* (2018) 261 FCR 503 at [18]:

“[18] It is common ground that nothing in the statutory constraints to be found within Pt 7AA of the Migration Act (as discussed, for example, in BMB16 v Minister for Immigration and Border Protection (2017) 253 FCR 448 per Dowsett, Besanko and Charlesworth JJ) affects the relevant existing case law on this topic, namely, the duty to consider claims and issues arising from material before it as that law applies to the Administrative Appeals Tribunal under Pt 5 of the Migration Act. In that regard, we note that:

- *The Tribunal review function requires it to consider all claims made by an applicant and its essential components or integers: Htun v Minister for Immigration and Multicultural Affairs (2001) 233 FCR 136 (Htun) per Allsop J (as the Chief Justice then was) (at [42]), with whom Spender J agreed.*
- *The Tribunal is only required to consider such claims where they are either:*

(a) the subject of substantial clearly articulated argument, relying on established facts; or

(b) clearly emerge from the materials: NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1 (NABE) per Black CJ, French and Selway JJ (at [55] and [68]) and AWT15 v Minister for Immigration and Border Protection [2017] FCA 512 (AWT15) per Barker J (at [67]).

- *These principles apply to the IAA regime: Minister for Immigration and Border Protection v BBS16 (2017) 257 FCR 111 per Kenny, Tracey and Griffiths JJ (at [79]) where their Honours said:*

... A body such as the IAA, which is conducting an inquisitorial review process in which there is a claim for protection under s 36(2)(a) of the [Migration] Act must not only consider and determine the case as articulated by the protection visa applicant, but also do so in relation to an unarticulated claim which is nevertheless raised clearly or squarely on the material before that review

body (see *NABE* at [58]-[61] per Black CJ, French and Selway JJ).

(Emphasis added)

- *As to whether a claim clearly emerges, the following principles were collected in AWT15 by Barker J (at [67]-[68]):*

(a) such a finding is not to be made lightly (NABE at [68]);

*(b) the fact that a claim **might** be said to arise from materials is not enough (NABE at [68]);*

(c) to clearly emerge from the materials, the claim must be based on “established facts” (SZUTM v Minister for Immigration and Border Protection (2016) 241 FCR 214 (SZUTM) per Markovic J (at [37]-[38])). In SZUTM, Markovic J said:

37 While the tribunal is not required to deal with claims which are not clearly set out and which do not clearly arise from the material before it, the tribunal is not limited to dealing with claims expressly articulated by an applicant. A claim not expressly advanced by an applicant will attract the review obligation of the tribunal when it is plain on the face of the material before it.

38 Both the appellant and the Minister have made submissions on whether there is a requirement that there be a claim based on “established facts”. At [35], the primary judge found, relying on NABE and Dranichnikov that, as the threshold point the claim must “emerge clearly from the materials before the Tribunal and should arise from established facts”. I agree with the primary judge’s approach: the decision in NABE must be read in light of the principle set out in Dranichnikov.

(d) while there is no precise standard to determining whether an unarticulated claim has been “squarely raised” or “clearly emerges” from the materials “a court will be more willing to draw the line in favour of an unrepresented party”: Kasupene v Minister for Immigration and Citizenship (2008) 49 AAR77 per Flick J (at [21]); and

(e) understanding whether a claim has clearly emerged from materials cannot be assessed in a vacuum. Consideration must be given to the way an applicant's claims are presented over time."

15. The Tribunal appropriately engaged with the issues before it relating to the question as to whether or not a genuine spousal relationship existed between the parties. It was not satisfied either as to the truthfulness of the visa applicant, or that a genuine spousal relationship existed. The Tribunal did not err in its considerations in that regard. It did not take irrelevant considerations into account when arriving at its decision. There is no merit to Ground 1 of the application for review.

Ground 2.

16. Ground 2 of the application for review was an assertion that because the Tribunal considered the irrelevant material as earlier referred to, the Tribunal was therefore affected by apprehended bias when it arrived at its decision.
17. As earlier found by the Court, the Tribunal was entitled to look at, and consider, the evidence which the visa applicant asserted was irrelevant. The visa applicant and the review applicant were each afforded an opportunity by the Tribunal to address those questions. The hearing of the application for review was in all respects fair. The decision of the Tribunal was open on the evidence before it.
18. The visa applicant was prepared to hide her identity so as to re-enter Australia unlawfully. The review applicant was uncaring as to important fundamental aspects of a genuine spousal relationship, namely those matters going to available funds, and the source of such funds.
19. The Tribunal was entitled to find:
 - a) At [35] that the relationship between the sponsor and the visa applicant was the hallmark of indifference and ignorance on the part of the review applicant, and the withholding of information and the telling of untruths on the part of the visa applicant. The Tribunal was entitled to find that neither such characteristics were indicative of a couple embarking upon a long-term and genuine

marriage together. The Tribunal's findings related to the nature of the relationship between the parties, and was germane to the decision making function to be carried out by it.

- b) At [36] that the parties did not have a mutual commitment to share life together to the exclusion of all others.

- 20. There was no factual basis for the suggestion that the Tribunal was affected by apprehended bias in arriving at its decision. The Court, when arriving at such finding, had had regard to the judgment of Edelman J in *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at [132] – [133] and [135] as follows:

“[132] The test for a reasonable apprehension of bias is a test of a "double might": whether a fair-minded lay observer might reasonably apprehend that the adjudicator might not bring an impartial and independent mind to the fair resolution of the issue to be decided. The notion of independence and impartiality is not limited to prejudgment of the issue. It is a "recognition of human nature" and "human frailty". It can include any other "preponderating disposition or tendency" and can arise by matters that create emotions of sufficient strength to sway opinion: "affection or enmity", "fear, hatred or love"

[133] The prism through which a reasonable apprehension of bias is tested, a fair-minded lay observer, is a familiar legal construct used for objective assessment. The construct assumes that the person is "intelligent". The person will be aware of the phenomenon that in adjudication, as in life generally, the mental plasticity of human decision making is subject to the unconscious

"stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. ... Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person]".

[135] Apprehended bias must be assessed by reference to all the circumstances existing at the relevant time of enquiry. If apprehended bias is assessed at the conclusion of a hearing, as the appeal in this case requires, then the reasons for decision might reveal matters relevant to the consideration of whether a reasonable apprehension exists. It would be absurd if, on the one hand, remarks made by the decision maker during the course of a

hearing could be considered as part of an assessment of the presence of reasonable apprehension of bias but, on the other hand, remarks at the conclusion of the proceeding could not. However, remarks at the conclusion of a proceeding or in reasons for decision are only one of the circumstances to take into account. In Michael Wilson & Partners Ltd v Nicholls, a joint judgment of four members of this Court cautioned against the error of assuming a reasonable apprehension of a decision maker's bias and using comments in the reasons for judgment by the decision maker to "confirm, enhance or diminish the existence of a reasonable apprehension of bias".

21. It cannot be said that no other rational or logical decision maker could not have made the same decision. As was said by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130] and [135]:

"[130] In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

...

[135] On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is

open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims. There was. The Tribunal did not believe the first respondent's claim that he had engaged in the "practice of homosexuality" in the UAE and accordingly it was not satisfied that he feared persecution if he returned to Pakistan."

22. It was of no moment that a different decision maker may have arrived at a different conclusion.⁴
23. Neither could the decision be considered as legally unreasonable, or one lacking an evident and intelligible justification, as such respective concepts were considered by Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [66] and [76] where it was said:

"[66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

...

*[76] As to the inferences that may be drawn by an appellate court, it was said in *House v The King* that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where*

⁴ SZMDS at [131] per Crennan and Bell JJ.

unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.”

24. The applicant has failed to establish jurisdictional error on the part of the Tribunal.
25. The application for review is without merit and is dismissed.
26. The Court will hear the parties as to costs.

I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Judge Egan

Associate:

Date: 6 May 2020